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LAU KEEN FAI

v.

LIM BAN KAY & ANOR

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
AHMAD MAAROP FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 02( )-31-2011 (W)]

C

7 DECEMBER 2011

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Notice of appeal - Whether irregular and misconceived - Whether leave must first be obtained for an appeal to be lodged in Federal Court - Whether Court*

D

of Appeal's decision not appealable without leave - Courts of Judicature Act 1964, s. 96(a) - Whether s. 103E of the Legal Profession Act 1976 imposes a bar to appellant's right of appeal - Whether appellant given right to three tiers of appeal from High Court to Court of Appeal to Federal Court

E

CIVIL PROCEDURE: *Appeal - Leave to appeal - Whether leave must first be obtained for an appeal to be lodged in Federal Court - Whether Court of Appeal's decision not appealable without leave - Courts of Judicature Act 1964, s. 96(a) - Whether s. 103E of the Legal*

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Profession Act 1976 imposes a bar to appellant's right of appeal - Whether appellant given right to three tiers of appeal from High Court to Court of Appeal to Federal Court

CIVIL PROCEDURE: *Jurisdiction - Appeal - Appeal from Disciplinary Board of statutory body - Legal Profession Act 1976,*

G

s. 103E - Disciplinary Board not a 'subordinate court' or 'inferior court' - Issue of jurisdiction - Whether arose - Whether appeal against decision of Disciplinary Board a continuation of a judicial process of granting a right of appeal to an appellant right to the Federal Court

H

LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary Board - Appeal from decision of Disciplinary Board - Right of appeal - Legal Profession Act 1976, s. 103E - Leave to appeal - Whether leave must first be obtained for an appeal to be lodged in Federal Court - Courts of Judicature Act 1964, s. 96(a) - Whether appellant given right to three*

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tiers of appeal from High Court to Court of Appeal to Federal Court

The appellant, an advocate and solicitor, was found guilty by the Disciplinary Board for fraudulent conduct in the discharge of his duties as a solicitor and was suspended under s. 93 of the Legal Profession Act 1976 ('LPA'). The appellant's appeal against the said decision was dismissed by both the High Court and the Court of Appeal. This was his appeal to the Federal Court against the decision of the Court of Appeal pursuant to s. 103E of the LPA. At the outset of the hearing of the appeal, the Malaysian Bar Council ('the second respondent') raised a preliminary objection based on the appellant's notice of appeal. It was the contention of the second respondent that (i) the appellant's notice of appeal filed was irregular and/or misconceived as leave of the Federal Court was not sought first. By virtue of s. 96(a) of the Courts of Judicature Act 1964 ('CJA'), the Court of Appeal's decision was not appealable without leave and (ii) that the s. 103E appeal under the LPA by the appellant was not decided by the High Court in the exercise of its original jurisdiction but rather in its supervisory jurisdiction being an appeal from the Disciplinary Board of a statutory body.

Held (dismissing preliminary objection)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The question for determination before this court was whether leave of the Federal Court was required in an appeal to the Federal Court. The new amended provision of s. 103E of the LPA now permits an appeal against the decision of the High Court to the Court of Appeal and thereafter to the Federal Court. There was no other specific provision in the LPA requiring that leave must first be obtained for an appeal to be lodged in the Federal Court. (para 1)

(2) The Disciplinary Board set up under the LPA was not a "'subordinate court'" or an "'inferior court"' and the issue of whether the High Court in hearing the appellant's case from the Disciplinary Board was exercising its original jurisdiction or appellate jurisdiction did not arise. Section 103E(5) of the LPA 1976 provides in clear terms a right to appeal to the Federal Court without the necessity of the leave under s. 96(a) of the CJA. The appeal against the decision of the disciplinary board under the LPA was in fact a continuation of a judicial process of granting a right of appeal to an appellant right to the Federal Court. (para 9)

A **(3)** Section 103E of the LPA does not impose any bar to the rights of appeal of the appellant. Reading into the said section as requiring leave of the Federal Court before the appellant was entitled to appeal to the Federal Court would not promote the purpose or object underlying the enacting of this
B new provision, which was to give an advocate and solicitor in the position of the appellant a right to three tiers of appeal from the High Court, Court of Appeal and the Federal Court. This was in consonant with the intention of Parliament as reflected in the Hansard. (para 12)

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(4) The provision of s. 96(a) of the CJA is a provision regulating civil appeals in general to the Federal Court. The LPA is an act relating to the legal profession in Malaysia, specifically to regulate the legal profession. The *maxim generalia specialibus non*
D *derogant* was applicable here which stated, *inter alia*, that where a special provision is made in a statute as in s. 103E of the LPA, that special provision excludes the operation of a general provision in the general law. (para 13)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu, peguambela dan peguamcara, telah didapati bersalah oleh Lembaga Disiplin untuk kelakuan penipuan dalam menjalankan tugas-tugasnya sebagai peguamcara dan telah digantung di bawah s. 93 Akta Profesion Undang-Undang 1976 ('APU'). Rayuan
F perayu terhadap keputusan tersebut telah ditolak oleh Mahkamah Tinggi dan Mahkamah Rayuan. Ini adalah rayuan perayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan di bawah s. 103E APU. Di permulaan perbicaraan rayuan, Majlis Peguam Malaysia ('responden kedua') telah membangkitkan
G bantahan awal berdasarkan notis rayuan perayu. Ia adalah hujahan responden kedua bahawa (i) notis rayuan perayu yang difailkan adalah tidak teratur atau/dan tersilap kerana kebenaran Mahkamah Persekutuan tidak diperolehi terlebih dahulu. Di bawah s. 96(a) Akta Mahkamah Kehakiman 1964 ('AMK'), keputusan Mahkamah
H Rayuan tidak boleh dirayu tanpa kebenaran dan (ii) bahawa rayuan s. 103E di bawah LPA oleh perayu tidak diputuskan oleh Mahkamah Tinggi dalam perlaksanaan bidangkuasa asalnya tetapi dalam bidangkuasa penyeliaan kerana ia adalah rayuan dari Lembaga Disiplin sebuah badan berkanun.

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Diputuskan (menolak bantahan awal)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Soalan yang perlu ditentukan di dalam mahkamah ini adalah sama ada kebenaran Mahkamah Persekutuan diperlukan di dalam rayuan ke Mahkamah Persekutuan di bawah s. 103E APU. Peruntukan baru yang dipinda s.103E APU sekarang membenarkan rayuan terhadap keputusan Mahkamah Tinggi ke Mahkamah Rayuan dan selepas itu ke Mahkamah Persekutuan. Tidak terdapat peruntukan khas yang lain di dalam APU yang memerlukan kebenaran diperolehi terlebih dahulu untuk satu rayuan dibuat di Mahkamah Persekutuan.

(2) Lembaga Rayuan yang ditubuhkan di bawah APU bukanlah 'mahkamah rendah' dan bukanlah 'mahkamah bawahan' dan isu sama ada Mahkamah Tinggi dalam mendengar kes perayu dari Lembaga Disiplin telah melaksanakan bidangkuasa asalnya atau bidangkuasa rayuan tidak timbul. Seksyen 103E(5) APU 1976 memperuntukkan syarat-syarat dengan nyata hak merayu kepada Mahkamah Persekutuan tanpa keperluan kebenaran di bawah s. 96(a) AMK. Rayuan terhadap keputusan Lembaga Disiplin di bawah APU adalah sebenarnya kesinambungan proses kehakiman dalam membenarkan hak rayuan kepada perayu ke Mahkamah Persekutuan.

(3) Seksyen 103E APU tidak mengenakan apa-apa halangan kepada hak-hak rayuan perayu. Seksyen tersebut jika dibaca sebagai memerlukan kebenaran Mahkamah Persekutuan sebelum perayu berhak membuat rayuan ke Mahkamah Persekutuan tidak akan menggalakkan tujuan dan objek mendasari penggubalan peruntukan baru ini, iaitu untuk memberi peguambela dan peguamcara dalam kedudukan perayu hak ke tiga peringkat rayuan ke Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan. Ini adalah sejajar dengan niat Parlimen seperti yang ditunjukkan di dalam Hansard.

(4) Peruntukan s. 96(a) AMK adalah peruntukan mengawal rayuan sivil secara umum ke Mahkamah Persekutuan. APU adalah akta berkaitan dengan profesion undang-undang di Malaysia, khususnya untuk mengawal selia profesion undang-undang. *Maxim generalia specialibus non derogant* boleh digunakan di sini yang menyatakan, antara lain, bahawa di mana peruntukan

A khas dibuat di dalam statut seperti s. 103E APU, peruntukan khas itu tidak termasuk operasi peruntukan am di dalam undang-undang am.

Case(s) referred to:

B *All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC **(refd)***

*Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC **(refd)***

*Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) [1995] 3 CLJ 316 SC **(refd)***

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy

C *[2011] 3 CLJ 241 FC **(refd)***

*Shivram Anand Shiroor v. Radhabai Shantram Kowshik & Anor [1984] 1 SCC 588 **(refd)***

*Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party) [2011] 7 CLJ 401 FC **(refd)***

D **Legislation referred to:**

Courts of Judicature Act 1964, ss. 4, 96(a)

Interpretation Acts 1948 and 1967, s. 23(1)

Legal Profession Act 1976, ss. 93, 103E(5), 103F

Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, r. 11

E *For the appellant - Dato' Harpal Singh Grewal (Joseph Yeo & Paari Perumal with him); M/s Joseph Yeo*

For the 1st respondent - Nga Koo Koy; M/s Ngeh & Co

For the 2nd respondent - Trevor George (Izalia Zainuddin with him); M/s Trevor George Partnership

F *[Appeal from Court of Appeal, Civil Appeal No: W-02-1992-2010]*

Reported by Suhainah Wahiduddin

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JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Background Facts

H **[1]** The appellant was admitted as an advocate and solicitor of the High Court of Malaya in 1989. By an order dated 15 January 2010 the disciplinary board established under s. 93 of the Legal Profession Act 1976 ("LPA") suspended the appellant from

I practice as an advocate and solicitor for a period of three years upon a complaint made by the first respondent against the

appellant. The appellant was found guilty by the disciplinary board for fraudulent conduct in the discharge of his duties as a solicitor over a loan transaction involving the first respondent. The appellant's appeal to the High Court was dismissed on 24 June 2010. He appealed to the Court of Appeal. The Court of Appeal dismissed his appeal on 13 May 2011. This is his appeal to this court against the decision of the Court of Appeal pursuant to s. 103E of the LPA.

Preliminary Objection

[2] At the outset of the hearing of the appeal before this court the second respondent, the Malaysian Bar Council raised a preliminary objection based on the appellant's notice of appeal dated 19 May 2011. It is the contention of the second respondent that the appellant's notice of appeal filed is irregular and/or misconceived as leave of the Federal Court was not sought first. By virtue of s. 96(a) of the Courts of Judicature Act 1964 ("CJA"), the Court of Appeal's decision is not appealable without leave. It was further contended by the second respondent that the s. 103E appeal under the LPA by the appellant was not decided by the High Court in the exercise of its original jurisdiction but rather in its supervisory jurisdiction being an appeal from the disciplinary board of a statutory body.

Decision

[3] The question for determination before this court is whether leave of the Federal Court is required in an appeal to the Federal Court pursuant to s. 103E of the LPA. For ease of reference, s. 103E of the LPA is reproduced as follows:

> 103E. Appeal from the decision of the Disciplinary Board
>
> (1) Any party aggrieved by any decision or order made by the Disciplinary Board under subsection 100(5), (8) or (9) or section 103D shall have the right to appeal to the High Court within one month of the receipt of the notification of the decision or order complained against; and no appeal shall lie against any other decision or order made by the Disciplinary Board.
>
> (2) There shall be no judicial review against any decision or order made by the Disciplinary Board.

A (3) The appeal shall be fixed for hearing before a single Judge of the High Court.

(4) The appeal shall be by way of an originating motion setting out the ground of appeal supported by affidavit.

B (5) Any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court.

(6) The Bar Council may in its discretion intervene at any stage of any appeal under this section.

C (7) The Disciplinary Board shall not be cited as a party in any appeal under this section.

(8) The Disciplinary Board shall have the right to appear in and address any High Court, the Court of Appeal or the Federal Court hearing an appeal under this section by an advocate and solicitor whether or not the advocate and solicitor is a member of the Disciplinary Board or the Bar Council.

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[4] It is to be noted the new s. 103E of the LPA was enacted pursuant to Amendment Act A1269 which came into force from 2 October 2006. The previous s. 103E of the LPA before the Amendment Act A1269 provides as follows:

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103E. Appeal from the decision of the Disciplinary Board

(1) Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

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(2) The appeal shall be fixed for hearing before three Judges of the High Court.

G

(3) Any party aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision of the High Court.

(4) The Bar Council may in its discretion intervene at any stage of any appeal under this section.

H

[5] The previous provision of s. 103E of the LPA conferred a right to appeal from the decision of the High Court to the then Supreme Court, with such an appeal being by way of re-hearing. The Supreme Court as an appellate court was entitled to re-examine the issue of guilt or whether the conduct of a solicitor

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amounted to misconduct within the meaning of the LPA and whether the sentence was appropriate. The appellant was vested with all the rights available to an appellant as in any other appeal.

[6] The new amended provision of s. 103E of the LPA now permits an appeal against the decision of the High Court to the Court of Appeal and thereafter to the Federal Court. There is no other specific provision in the LPA requiring that leave must first be obtained for an appeal to be lodged in the Federal Court.

[7] Learned counsel for the second respondent relied on the two Federal Court cases of *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241 and *Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party)* [2011] 7 CLJ 401 for the purpose of arguments before us to support his contention that leave is required under s. 96(a) of the CJA for appeal to the Federal Court. In *Koperasi Jimat Cermat*, the Federal Court was concerned with an appeal under the Co-operative Societies Act 1993 (CSA) while in *Walton* it was concerned with an appeal under the Trade Marks Act 1976 (TMA).

[8] There is a useful discussion in both the cases of *Koperasi Jimat Cermat* and *Walton* on whether the tribunals under both the CSA and TMA were a subordinate court or inferior court and whether the High Court was exercising its original jurisdiction or appellate jurisdiction when it heard the appeal from the respective tribunals. The present appeal before this court is concerned with the provisions on the question of appeal under the LPA. There is however no reported decision directly touching on the provisions on appeal under the LPA. Section 96(a) of the CJA provides as follows:

> Section 96: Conditions of Appeal
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) *from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction* involving a question of general principle decided for the first time or a question of importance upon which further argument and decision of the Federal Court would be to public advantage. (emphasis added)

[9] It is our considered view that the disciplinary board set up under the LPA is not a "subordinate court" or an "inferior court" and the issue of whether the High Court in hearing the appellant's case from the disciplinary board was exercising its original jurisdiction or appellate jurisdiction does not arise. Section 103E(5) of the LPA 1976 provides in clear terms a right to appeal to the Federal Court without the necessity of the leave under s. 96(a) of the CJA. Even if we were to hold that the disciplinary board is a subordinate court or an inferior court then based on the reasonings of this court in the two cases of *Koperasi Jimat Cermat* and *Walton*, the process of appeal would have ended in the Court of Appeal. We are of the view the appeal against the decision of the disciplinary board under the LPA is in fact a continuation of a judicial process of granting a right of appeal to an appellant right to the Federal Court.

[10] It is to be stated here that the basic task of the court is to ascertain and give effect to the true meaning of what Parliament had intended on the provisions of the Act it had enacted. (See the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors.* [2006] 4 CLJ 195). Where the words are clear and unambiguous, a court should give effect to the plain words. There is no question of construction. (See the case of *Shivram Anand Shiroor v. Radhabai Shantram Kowshik & Anor.* [1984] 1 SCC 588). Since the words of s. 103E(5) of the LPA are clear and unambiguous they should be given their plain meaning. An appeal against the decision of the disciplinary board shall lie to the High Court and thereafter to the Court of Appeal and to the Federal Court.

[11] To further support the argument that the appellant has the right of appeal to the Federal Court without requiring leave under s. 96(a) of CJA, reliance can be placed on the Hansard when the Bill to the Amendment Act A1269 to the LPA was tabled in Parliament. On this point our courts have had on occasion before referred to the Hansard to assist in interpreting the true intention of the legislature in enacting the laws it had passed. (See the case of *Chor Phaik Har v. Farlim Properties Sdn. Bhd* [1994] 4 CLJ 285). In the context of the present case the paragraphs in the Hansard which are relevant as an aid to interpretation can be found in the debate during the second and third reading of the Bill wherein the Honourable Minister in the Prime Minister's Department had this to say:

Tuan Yang di-Pertua, fasal 33 yang menggantikan seksyen 103E memperuntukkan tentang hak merayu terhadap keputusan atau perintah Lembaga Tatatertib yang dicadangkan, dihadkan hanya kepada yang dibuat menurut seksyen 100(5), (8) atau (9) atau seksyen 103D dan tidak terhadap apa-apa keputusan atau perintah yang lain. Dicadangkan juga diperuntukkan bahawa semakan kehakiman tidak boleh dibuat terhadap mana-mana keputusan atau perintah Lembaga Tatatertib. Peruntukan sedemikian difikirkan perlu untuk memastikan prosiding tatatertib berjalan lancar dan cepat dan tidak terdapat ruang yang boleh membawa kepada penyalahgunaan proses kehakiman.

Seperkara lagi yang ingin saya maklumkan secara khusus kepada Dewan yang mulia ini ialah sesuatu rayuan akan didengar di hadapan seorang Hakim Mahkamah Tinggi sahaja, bukannya tiga sebagaimana yang diperutukkan sekarang. *Rayuan seterusnya akan melalui proses rayuan di Mahkamah Rayuan dan kemudiannya di Mahkamah Persekutuan. Bukannya terus kepada Mahkamah Persekutuan sebagaimana yang diperuntukkan sekarang.*

... Suatu aduan telah dibuat, diberi peluang untuk mendapatkan keadilan atau remedi, dengan seluas-luasnya, dengan diizinkan melalui semua peringkat sistem kehakiman yang wujud di Negara ini. (emphasis added)

[12] It is our judgment s. 103E of the LPA does not impose any bar to the rights of appeal of the appellant. Reading into the said section as requiring leave of the Federal Court before the appellant is entitled to appeal to the Federal Court will not promote the purpose or object underlying the enacting of this new provision, which is to give an advocate and solicitor in the position of the appellant a right to three tiers of appeal from the High Court, Court of Appeal and the Federal Court. This is in consonant with the intention of Parliament as reflected in the Hansard earlier highlighted.

[13] It is also to be noted the provision of s. 96(a) of the CJA is a provision regulating civil appeals in general to the Federal Court. The LPA is an Act relating to the legal profession in Malaysia, specifically to regulate the legal profession. The *maxim generalia specialibus non derogant* is applicable here which states *inter alia* that where a special provision is made in a statute as in s. 103E of the LPA that special provision excludes the operation of a general provision in the general law. (See the case of *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))* [1995] 3 CLJ 316).

[14] A reference was made during arguments before us as to the effect of the provision of s. 4 of the CJA in relation to the need for the appellant to satisfy the requirement of s. 96(a) of the CJA in order to proceed with his appeal under s. 103E of the LPA. Section 4 of the CJA provides as follows:

> 4. Provision to prevent conflict of laws
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

We are of the view the said s. 4 of the CJA has no application here. The inconsistency or conflict is in respect of any other written law in force at the commencement of the Act (the CJA). The CJA came into force on 16 March 1964. The LPA was not then in force. It only came into being on 1 June 1977.

[15] A reference was also made to the provision of r. 11 of the Legal Profession (Disciplinary Proceeding) (Appeal) Rules 1994 ("the LPA Rules") relating to the procedure of appeals from the decision of the High Court which provides as follows:

> 11. Appeals against decisions of High Court
>
> Any appeal under section 103E(5) of the Act shall be made in accordance with the Courts of Judicature Act 1964, Rules of the Court of Appeal 1994, and the Rules of the Federal Court 1995.

On this point it is to be noted that LPA Rules is made pursuant to s. 103F of the LPA which gives the power to the disciplinary board to make rules to regulate the procedure pertaining to disciplinary proceedings. Rule 11 in our view is *ultra vires* the parent Act as it purports to regulate appeals under s. 103E(5) of the LPA. There is no authority for the disciplinary board to impose conditions regulating appeals to the Federal Court when none exists in s. 103E(5) of the LPA. The power of the disciplinary board is only to the extent of making rules to regulate the procedure pertaining to disciplinary proceedings. The right of appeal to the Federal Court is a substantive right and not procedural. That being the case, r. 11 of the LPA Rules if it purports to take away the right of the appellant to appeal directly to the Federal Court without leave is to that extend null and void. (See s. 23(i) of the Interpretation Acts 1948 and 1967).

Conclusion

[16] For the reasons abovestated we would dismiss the preliminary objection. There is no requirement for the appellant to obtain leave under s. 96(a) of the CJA to proceed with his appeal before the Federal Court.